No. 83-1781

In the Supreme Court of the United States

OCTOBER TERM, 1983

JAMES ANTHONY MICHAELS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioner contends that there was insufficient evidence to link the automobile he was convicted of conspiring to destroy to an activity affecting interstate commerce; that a fingerprint discovered during a search of an apartment should have been suppressed because the scope of the search exceeded that authorized by the warrant; and that the district court abused its discretion by failing to declare a mistrial following an improper remark during the prosecutor's closing argument.

1. After a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on one count of conspiring to damage and destroy a vehicle used in an activity affecting interstate commerce, in

violation of 18 U.S.C. 371 and 844(i).[1] He was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. A1-A14) in an opinion reported at 726 F.2d 1307.

The evidence at trial, the sufficiency of which is not in dispute except with respect to the jurisdictional issue, showed that in 1981 petitioner conspired with co-defendant Milton Schepp and others to injure Paul Leisure, a field organizer for Local 42 of the Laborer's International Union. Leisure was seriously hurt on August 11, 1981, when a bomb destroyed the automobile he was driving.

2. The court of appeals correctly rejected petitioner's fact-bound contentions in a decision that does not conflict with any decision of this Court or any other court of appeals. Further review by this Court is therefore unwarranted.

a. Petitioner argues (Pet. 6-10) that Leisure's car had an insufficient nexus to an activity affecting interstate commerce within the meaning of Section 844(i) because it was used merely as transportation between assignments and not for any commercial purpose. The court of appeals found, however, that the "uncontradicted evidence sufficiently demonstrates that the Cadillac automobile was used by Leisure *to conduct union business*" (Pet. App. A3 (emphasis added)). Leisure was a union organizer who was required to travel to different job sites to enroll new union members and to collect dues from current members.[2] He was

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[1]Petitioner was acquitted on a substantive count under Section 844(i) and on a charge of making an illegal destructive device in violation of 26 U.S.C. 5861(f). A co-defendant, Milton Schepp, was a fugitive at the time of petitioner's trial; he has since been apprehended, tried, and convicted on all three counts. His appeal is pending.

[2]The union's activities indisputably affect interstate commerce (Pet. App. A4).

reimbursed $200 per month by the union for use of his automobile on this business. Membership applications, dues receipts, and other union forms were found in the car after it had been bombed. Use of the automobile accordingly "was an integral and necessary part of Leisure's job assignment and was not merely a means of traveling to and from work." *Ibid. United States* v. *Monholland*, 607 F.2d 1311 (10th Cir. 1979), relied on by petitioner, is inapposite because the vehicle in question there was used simply to drive to and from work, not as an integral part of the job itself (see *id.* at 1316).[3]

b. Petitioner argues (Pet. 10-11) that his fingerprint, found on a table leg during the search of an apartment apparently used to plan the bombing, should have been suppressed because the scope of the search exceeded that

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[3] *United States* v. *Mennuti*, 639 F.2d 107 (2d Cir. 1981), is similarly inapposite because the private dwellings that were destroyed were not used in connection with commercial activities.

The decision in the instant case is in accord with decisions of other courts of appeals holding that a minimal effect on commerce suffices under the statute. See, *e.g.*, *United States* v. *Andrini*, 685 F.2d 1094 (9th Cir. 1982) (target building constructed of out-of-state materials); *United States* v. *Barton*, 647 F.2d 224 (2d Cir.), cert. denied, 454 U.S. 857 (1981) (damaged buildings housed illegal gambling businesses where food and drink served, some of which originated in another state; fuel for heat and lights also originated out-of-state); *United States* v. *Grossman*, 608 F.2d 534 (4th Cir. 1979) (bombed excavation equipment was not used in owner's business but had been manufactured several years earlier in another state, was currently being offered for sale in a nationwide trade newspaper, and was insured by a company doing business in several states); *United States* v. *Schwanke*, 598 F.2d 575 (10th Cir. 1979) (cafe in target building sold candy, gum, and vegetables from another state); *United States* v. *Sweet*, 548 F.2d 198 (7th Cir.), cert. denied, 430 U.S. 969 (1977) (liquor in destroyed tavern originated out-of-state even though it was purchased from a local distributor). Because Leisure's car was actually used in a business that affects interstate commerce, the conclusion that its destruction constitutes an offense within Section 844(i) follows *a fortiori* from the cited precedents.

authorized by the warrant,[4] which was for components of a destructive device. At petitioner's request, a friend had rented the apartment for him in a fictitious name in April 1981, paying in cash for six months' rent in advance (Pet. App. A5). Cars purchased in a fictitious name for co-defendant Schepp, as well as petitioner's own car and one registered to his brother, were seen parked in front of the apartment during the spring and summer of 1981 (*id.* at A5-A6).

Even assuming arguendo that the agents exceeded the scope of the authorized search when they dusted the apartment for fingerprints, the court of appeals correctly concluded (Pet. App. A11) that any error in admitting petitioner's fingerprint was harmless because petitioner testified at trial that he had visited the apartment on several occasions. There is no merit to petitioner's argument that he was forced to testify in order to explain the fingerprint, because there was ample evidence apart from the print that connected petitioner to the apartment (see *id.* at A5-A6). In light of this evidence and his own testimony, petitioner cannot reasonably claim prejudice from admission of the print.[5]

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[4]Probable cause for the warrant was based in part on the discovery of materials related to the manufacture of a bomb and remote control device in a communal trash bin located on the grounds of the apartment complex (Pet. App. A6). Petitioner no longer presses his arguments, properly rejected by the court of appeals (*id.* at A7-A11), that the search of the trash bin was improper and that the affidavit submitted in support of the warrant was insufficient to support a finding of probable cause.

[5]In any event, the search was proper because the apartment appeared to have been abandoned by the time it was searched in August 1981. There was no food in the refrigerator and no clothing in any closet. While there was some furniture and a bed, there were no pillows or sheets on the bed. Suppression Hearing Tr. 78-82. Moreover, clothing, food, and various other items had been found in a bag in a communal trash bin outside the apartment, along with mail addressed to the

c. Finally, petitioner contends (Pet. 12-14) that the district court erred in refusing to grant a mistrial after the prosecutor improperly stated during closing argument that Leisure was not called as a witness because he was a "gangster." The court of appeals' conclusion (Pet. App. A13-A14) that the district court acted within its discretion is plainly correct. Although the comment may have been improper,[6] the district court's prompt actions in sustaining petitioner's objection and admonishing the jury "to disregard the comment in its totality" (*id.* at A14) cured any error. See *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 644 (1974). The court of appeals further noted (Pet. App. A14) that the strong evidence against petitioner (see *id.* at A4-A7) and the jury's lengthy deliberations also indicate that petitioner received a fair trial. Moreover, the comment here was not directed at petitioner, his witnesses, or his counsel. Cf. *United States* v. *Lane*, 698 F.2d 900 (7th Cir. 1983). Any error in the prosecutor's remark was accordingly harmless. See *United States* v. *Hasting*, No. 81-1463 (May 23, 1983).

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apartment (III Tr. 34-43; see also Pet. App. A6). This was ample evidence from which the agents could reasonably conclude that the apartment had been abandoned, and is consistent with the testimony at trial that petitioner had said to a friend that the apartment "had been wiped clean" and that "there was nothing there" (Pet. App. A7). See, *e.g.*, *Mullins* v. *United States*, 487 F.2d 581 (8th Cir. 1973); see also *United States* v. *Hunter*, 647 F.2d 566 (5th Cir. 1981) (per curiam). Accordingly, petitioner lacked the legitimate expectation of privacy necessary to support his Fourth Amendment claim. *Rakas* v. *Illinois*, 439 U.S. 128 (1978); *Abel* v. *United States*, 362 U.S. 217 (1960).

[6]The "invited response" issue presented in *United States* v. *Young*, cert. granted, No. 83-469 (Feb. 21, 1984), is not raised by the instant petition, as the court of appeals found that the comment here was not responsive to defense counsel's closing argument (Pet. App. A13). Moreover, unlike in *Young*, there was here a timely objection that produced a prompt curative instruction. There is thus no need to hold this petition pending a decision in *Young*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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